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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In re: SEA HAWAII RAFTING, LLC, Debtor.	Civil No. 16-00230-LEK-KSC On Appeal from: United States Bankruptcy Court for the District of Hawaii Case No. 14-01520 (Chapter 7)
CHAD BARRY BARNES, Appellant, v. DANE S. FIELD, TRUSTEE, Appellee.	**MOTION TO DISMISS APPEAL; EXHIBITS “A” THROUGH “D”; DECLARATION OF SIMON KLEVANSKY; CERTIFICATE OF SERVICE** Related Docket No. 12

MOTION TO DISMISS APPEAL

Dane S. Field (the "Trustee"), Trustee of the estate of Sea Hawaii Rafting, LLC ("Sea Hawaii") in In re Sea Hawaii Rafting LLC, Bankr. Case No. 14-01520 (Bankr. D. Haw.) (the "Sea Hawaii bankruptcy case"), appearing through his counsel, hereby moves the Court to dismiss the appeal filed by purported creditor, Chad Barry Barnes ("Barnes"), as moot under Section 363(m) of the Bankruptcy Code, 11 U.S.C. §363(m) and Adeli v. Barclay (In re Berkeley Delaware Court, LLC), ---F.3d ---, 2016 WL 4437616 (9th Cir. Aug. 23, 2016), or, alternatively, as moot under the independent basis that Barnes has no secured or unsecured claim in the Sea Hawaii bankruptcy, and therefore Barnes lacks standing in this case.

I. STATEMENT OF FACTS.

On appeal, Barnes challenges the Bankruptcy Court's order authorizing the sale of a Zodiac raft, the "M/V Tehani" (the "boat"), together with its trailer, to Aloha Ocean Excursions, LLC, a company owned by Kristin Kimo Henry ("Kris Henry"), for a total of $35,000.00. See Order Granting Trustee's Motion for Order (I) Authorizing Sale of Boat and Trailer Under Bankruptcy Code §363, and (II) Otherwise Granting Relief, Filed on March 29, 2016, filed on May 9, 2016 (the "Sale Order"), Bankr. Dkt. No. 185, attached hereto as Exhibit "A". Kris Henry is the owner of Sea Hawaii, and is a debtor in his own chapter 13 bankruptcy. The Sale Order provides that the boat and trailer "are being purchased by the Buyer in good faith within the meaning of Bankruptcy Code §363(m), and, accordingly, the authorization and purchase shall be unaffected by any appeal heretofore, unless such authorization and purchase have been stayed pending appeal." Id. at 4, ¶4. No stay of the Sale Order was requested or granted, and the boat and trailer have now been sold.[1] See Report of Sale, filed on September 27, 2016, attached hereto as Exhibit "B"; Declaration of Simon Klevansky, ¶6, filed herewith.

II. LEGAL ARGUMENT.

a. The appeal is moot because the property was sold free of liens and encumbrances, pursuant to 11 U.S.C. §363.

Article III, §2 of the United States Constitution limits the federal courts' jurisdiction to actual "cases" or "controversies." See U.S. Const., Art. III, §2. A case as to which there was once a live controversy can become moot on appeal, if the circumstances change. Public Utilities Com'n of State of Cal. v. Federal Energy Regulatory Com'n, 100 F.3d 1451, 1458 (9th Cir. 1996).

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[1] The Sale Order was entered prior to mediation ordered by the Honorable District Court Judge J. Michael Seabright, and the time to consummate the purchase and sale arrived while the parties were in mediation before the Honorable Magistrate Judge Barry M. Kurren. The Trustee agreed, in deference to Judge Kurren, to defer the closing until after the mediation was concluded on August 29, 2016. The mediation has now concluded, and the boat and trailer have been sold.

In the instant case, the "bankruptcy mootness rule" is also applicable. Bankruptcy Code Section 363(m) provides that bankruptcy sales, under certain circumstances and conducted pursuant to certain requirements, unless stayed, cannot be reversed:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. §363(m) (emphasis added); Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423-24 (9th Cir. 1985). The purpose of the bankruptcy mootness rule is to further finality in bankruptcy with respect to asset sales, and encourage participation in such sales to increase the value of property of the estate. See Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172 (9th Cir. 1988).

Recently, in In re Berkeley, 2016 WL 4437616, at *3, the Court of Appeals confirmed that the bankruptcy mootness rule applies even when the sale is to a party to the bankruptcy proceeding, provided that the objecting party has failed to seek and obtain a stay of a sale order pending appeal. In In re Berkeley, the bankruptcy estate held legal claims against a lender, and the trustee determined that a settlement agreement with the lender provided fair and equitable terms to the estate. When no higher bid was made for the claims, the bankruptcy court granted the trustee's motion and approved the settlement agreement. The debtor's principal appealed the court's approval of the settlement to the district court, but "[s]ignificantly, he failed to seek a stay of the sale order." The district court dismissed the appeal as moot under 11 U.S.C. §363(m)." Id. at *2. The court then rejected the appellant's arguments that the mootness rule would not apply where the overbid procedures did not result in competing bids, or where the counterparty was not an "outside party":

> We have applied the mootness rule to § 363 sales even where the purchaser was a party to the appeal, and where the purchaser had not yet taken irreversible steps following the sale. … Where, as here, a bankruptcy court invokes § 363 for a sale of claims[2] pursuant to a settlement agreement, all parties are bound by § 363(m)'s requirement to seek a stay regardless of whether an outside party makes a bid on the sale."

Id. at *3.

Similarly, in the instant case, the Trustee's motion for sale cited the Trustee's determination, upon independent consultation, that the sale price for the boat and trailer was reasonable, but, in an abundance of caution, invited overbids. See Memorandum in Support of Motion for Order Authorizing Sale, at 3, Bankr.

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[2] The Court determined that approval of a settlement with a §363(m) finding was appropriate, as a settlement is constructively a sale of an asset, and settlement of a claim is effectively sale of the claim to the settling party. "We agree with the [Bankruptcy Appellate Panel] and with our sister circuits, and hold that a bankruptcy court has the discretion to apply § 363 procedures to a sale of claims pursuant to a settlement approved under Rule 9019." Id., at *3.

Dkt. No. 151; Notice of Hearing, Bankr. Dkt. No. 152. There were no overbids. See Declaration of Simon Klevansky, filed herewith.

The Bankruptcy Court entered findings that the sale price for the boat and trailer were fair and reasonable, and that the sale has been offered and accepted in good faith between the buyer and the Trustee. See Sale Order, at 3, Bankr. Dkt. No. 185. The Court then ordered that the sale would be unaffected by any appeal, unless it shall have been stayed pending appeal. Id. at 4. No stay was sought or obtained. See Declaration of Simon Klevansky, filed herewith.

Accordingly, there remains no live controversy in this case, and pursuant to Section 363(m) of the Code and In re Berkeley, the Trustee respectfully submits that Barnes' appeal from the Bankruptcy Court's Sale Order should be dismissed as moot.

b. The Appeal Should Be Dismissed on the Independent Ground that Barnes is Without Standing to Contest the Sale.

Separate and apart from Barnes' failure to seek a stay of the Bankruptcy Court's Sale Order, Barnes' appeal should be dismissed because Barnes is without standing to contest the disposition of the boat and trailer.

The "case" or "controversy" requirement of Article III, §2 of the United States Constitution requires parties to demonstrate that they have standing to sue, by demonstrating an "injury in fact." See, e.g., Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 777 (9th Cir. 1999). In the bankruptcy context, prudential standing additionally entails the requirement that an appellant demonstrate that he or she suffered a direct and adverse pecuniary affect as a result of an order of the Bankruptcy Court. Id.; Kekona v. Smith (In re Smith), 98 F.3d 1346 (9th Cir. 1996) (unpublished); Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983).

In the instant case, to have standing to appeal, Barnes would have to demonstrate that he has a claim as a creditor against the Sea Hawaii bankruptcy estate. There are two possible types of claims he could have: secured or unsecured.

On November 25, 2015, the Bankruptcy Court determined that Barnes had no unsecured claim against the Sea Hawaii estate. See Order Sustaining In Part, and Reserving In Part, Trustee's Objection to Informal Proof of Claim (Notice of Maritime Lien of Chad Barnes) and Request for Estimation of Claim, filed on November 25, 2015, Bankr. Dkt. No. 65, attached hereto as Exh. "C". That Order became final on December 9, 2015, and Barnes filed no appeal from it. See Declaration of Simon Klevansky, filed herewith. At that time, the Bankruptcy Court reserved the question of whether Barnes had a secured claim against the boat.

Subsequently, on March 15, 2016, the Bankruptcy Court disposed of the possibility that Barnes might have a secured claim upon the boat, by valuing his secured claim in the amount of "$0.00." See Order Granting Trustee's Renewed Request for Ruling Upon Estimation of Claim, and Estimating Claim, filed on March 15, 2016, Bankr. Dkt. No. 140, attached hereto as Exh. "D". That Order became final on March 29, 2016, and Barnes filed no appeal from it. See Declaration of Simon Klevansky, filed herewith.

Accordingly, independent of Barnes' failure to secure a stay of the Sale Order itself, resulting in mootness of the appeal pursuant to Section 363(m) of the Bankruptcy Code, Barnes is without standing to appeal from the Sale Order or otherwise contest the sale, because he has no secured or unsecured claim as a creditor in the Sea Hawaii bankruptcy case. For this additional reason, the appeal should be dismissed.

III. CONCLUSION.

For the foregoing reasons, the instant appeal from the Bankruptcy Court's Sale Order should be dismissed as moot.

DATED: Honolulu, Hawaii, September 27, 2016.

/s/ Simon Klevansky
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